91-105

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TINO VILLANUEVA,
Petitioner,

v.

WELLESLEY COLLEGE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 17, 1991

QUESTIONS PRESENTED

1. Whether the greater burden of proof that the First Circuit imposes upon a plaintiff in an academic tenure case is in conflict with this Court's consistent interpretation of Title VII?

2. Whether the First Circuit's requirement that a Title VII plaintiff, in order to survive the employer's motion for summary judgment, must adduce some evidence of prohibited discrimination in addition to rebutting the employer's nondiscriminatory explanation is in conflict with this Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and with decisions of other Circuits?

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WELLESLEY COLLEGE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Tino Villanueva (hereinafter the "petitioner") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit affirming the grant of summary judgment by the United States District Court for the District of Massachusetts in favor of Wellesley College (hereinafter "Wellesley") on petitioner's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq., and other statutes.

Opinions Below

The opinion of the Court of Appeals is reported at 930 F.2d 124 and is reprinted beginning at page A-1 of the Appendix, infra. The District Court's opinion is not reported and is reprinted beginning at page B-1 of the Appendix, infra. The Report and Recommendation of the United States Magistrate Judge is not reported and is reprinted beginning at page C-1 of the Appendix, infra.[1/]

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Involved

This case involves 42 U.S.C. §2000e-2(a)(1) which provides:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or

---

[1/] References to the opinions reprinted in the Appendix appear throughout the petition as "App" followed by the relevant page number.

national origin.

It also involves Fed. R. Civ. P. 56(c), which provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Statement of the Case

This case was filed against Wellesley College in the United States District Court for the District of Massachusetts on August 11, 1987. The District Court had jurisdiction of this action pursuant to 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1343(4).

This is a classic employment discrimination case. Wellesley College is, and has been for years, a bastion of white privilege. Despite the lip service it pays to an affirmative action program with respect to its faculty, over two decades since the enactment of Title VII have brought little change to the Wellesley campus. Wellesley has never granted tenure to a minority person of Hispanic origin, and as recently as the period from 1980 to 1986 the percentage of full-time Hispanic faculty members was less than 1%.

Similarly, the percentage of full-time black faculty members never exceeded 3.1% during the same time period. This was true despite the fact that the national

average of minority faculty members in colleges and universities was 6.2%.

Petitioner, a brown-skinned male of Mexican-American ancestry, had been employed at Wellesley since 1974. He started teaching as a part-time instructor and was appointed to a tenure-track assistant professorship in 1980 when he completed his Ph.D. at Boston University. He was reappointed two times with the enthusiastic recommendation of the Reappointment and Promotion ("R & P") Committee of the Spanish Department. He compiled a significant record of scholarly publications; he distinguished himself as a teacher and as an internationally known poet; and he was active in service to the College community and to the Spanish Department.

From 1978 to the 1985-86 academic year, when petitioner was considered for tenure, all of the tenure candidates in the Spanish Department had been white and female. Wellesley granted tenure to all of them. Since 1985-86, the only tenure candidate in the Spanish Department has been white and female. She, too, was granted tenure by Wellesley. Petitioner, however, was denied tenure despite the fact that his qualifications were equal, or superior, to the qualifications of the four white women who were granted tenure.

After exhausting his administrative remedies before the Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination, petitioner filed suit in the United States District Court for the District of Massachusetts on August 11, 1987, alleging that he had been denied tenure on account of his race,

color, sex and age.[2/] In 1989, after the completion of discovery, Wellesley filed motions for summary judgment on the ground that there was no genuine disputed issue of fact with respect to its claim that petitioner was denied tenure solely because he failed to meet Wellesley's standards of excellence.

The case was referred to a magistrate who, in a Report and Recommendation dated June 14, 1990, recommended that the District Court grant Wellesley's motions. (App.C). The magistrate found that petitioner had established a prima facie case of a discriminatory denial of tenure. (App. C-9); that Wellesley had met its burden of articulating a legitimate, nondiscriminatory reason for denying petitioner tenure (App. C-13); and that there were numerous factual disputes with respect to Wellesley's explanations for the denial of tenure. (App. C-14). Nevertheless, quoting from the First Circuit's decision in Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990), he concluded that summary judgment should be granted because "no rational trier of fact could reasonably conclude '. . . that the reason given was not only a sham, but a sham to cover up the employer's real motive: [improper] discrimination.'" (App. C-18, 19). The District Court adopted the magistrate's recommendation and granted Wellesley's motions for the reasons set forth in the report. (App.B-2).

[2/] Petitioner alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. In an amended complaint filed on September 2, 1987, petitioner added claims under the Civil Rights Act of 1966, 42 U.S.C. §1981, and M.G.L. c. 151B, §4(1) and (1B).

On appeal, the First Circuit affirmed this decision on the ground that in an academic tenure case "special considerations apply." (App.A-7). It held that because of the "delicate equilibrium" between its obligation to respect academic freedom and its duty to eliminate workplace discrimination in educational settings, a Title VII plaintiff must, in order to prevail at trial, convince a trier of fact that the defendant's articulated reasons for denying tenure "were 'obviously weak or implausible,' or that the tenure standards for prevailing at the tenure decisions were 'manifestly unequally applied.'" (App.A-9).

In light of this ultimate burden at trial, the Court of Appeals rejected petitioner's argument that he had adduced sufficient evidence to raise a genuine issue of fact that Wellesley's articulated reasons for its denial of tenure were pretextual:

> Although Villanueva has presented evidence showing that he was qualified for tenure, he has not demonstrated that Wellesley's justification was a pretext; a fortiori, he has not shown that it was a pretext for discrimination.

(App. A-13). The court noted that merely by showing that there was a dispute with respect to petitioner's qualifications for tenure, "Wellesley has successfully dispelled any inference of discrimination, and none of Villanueva's evidence has brought it back." (App. A-15).

REASONS FOR GRANTING THE WRIT

I.

THE BURDEN OF PROOF THAT THE FIRST CIRCUIT IMPOSES ON A TITLE VII PLAINTIFF IN AN ACADEMIC TENURE CASE IS IN CONFLICT WITH THIS COURT'S CONSISTENT INTERPRETATION OF TITLE VII

Ever since McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), this Court has held consistently that a plaintiff can prevail under Title VII if he or she makes out a prima facie case of discrimination and proves, by a preponderance of the evidence, that any legitimate, nondiscriminatory explanation articulated by the defendant for its employment decision is a pretext. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978). The Court has applied this same standard whether the case involved entry level blue collar workers as in McDonnell Douglas, or higher level professional employees, as in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). Indeed, this Court has interpreted the mandate of Title VII broadly to outlaw discrimination on the basis of race, color and sex in whatever setting it is found. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In the decision below, however, the First Circuit held that "special considerations" applicable in an academic tenure case warrant imposing a heavier burden of proof on

the plaintiff than in any other Title VII case. The court explained that because of its concern for academic freedom, to prevail at trial a plaintiff must convince the trier of fact that an educational institution's articulated reasons for denying tenure:

> were "obviously weak or implausible," or that the tenure standards for prevailing at the tenure decisions were "manifestly unequally applied." The essential words here are "obviously" and "manifestly." A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.

(App. A-9) (citations omitted). This requirement that the employer's pretext be "obvious" or "manifest" for the plaintiff to prevail virtually immunizes the academic tenure process from review and substantially undermines the effectiveness of Title VII in eliminating discrimination in higher education.

In University of Pennsylvania v. E.E.O.C., 110 S. Ct. 577 (1990), this Court rejected a university's similar claim that its right to "academic freedom" required the recognition of a privilege against disclosure of confidential peer review materials in connection with administrative EEOC proceedings on a faculty member's complaint that she had been denied tenure on the basis of race, sex, and national origin. The Court noted that the extension of

Title VII in 1972 represented "Congress' considered response to the widespread and compelling problems of invidious discrimination in educational institutions" and concluded that the effect of the extension "was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions." Id. at 582-583. The Court reasoned that acceptance of a special privilege of nondisclosure for academic institutions "would lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society." Id. at 585.

For the same reasons, this Court should repudiate the decision of the First Circuit which goes even further in creating a special privilege which will insulate the academic tenure process from effective review under Title VII. By making it more difficult for a plaintiff to prove that the defendant institution's articulated reasons for its denial of tenure are a pretext for discrimination, the court below ignored the mandate of Congress and the admonition of this Court that "ferreting out this kind of invidious discrimination is a great if not compelling governmental interest." Id. at 584.

II.

THE FIRST CIRCUIT'S REQUIREMENT THAT, AT THE SUMMARY JUDGMENT STAGE, A TITLE VII PLAINTIFF MUST ADDUCE SOME EVIDENCE OF PROHIBITED DISCRIMINATION IN ADDITION TO MAKING OUT A PRIMA FACIE CASE AND REBUTTING THE EMPLOYER'S NONDISCRIMINATORY EXPLANATION IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS.

In the present case and in other recent decisions, the First Circuit has developed a rule relating to a Title VII plaintiff's burden of proof at the summary judgment stage that is in conflict with McDonnell Douglas v. Green, 411 U.S. 792 (1973) and its progeny, as well as with the decisions of most federal circuits. In Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990), the court held that at the third step of the McDonnell Douglas analysis, the employee must do more than merely adduce some evidence that an employer's nondiscriminatory explanation is pretextual in order to defeat the employer's motion for summary judgment. According to the court, when, at the summary judgment stage, "the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination." Id. at 9. Any doubt as to the meaning of

this language was eliminated in Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 48 (1st Cir. 1990), when the court explained that in order to withstand summary judgment in the First Circuit, "a plaintiff has the burden not only of proving that the articulated reasons of the employer were pretextual but also of adducing additional evidence that the articulated reasons were a pretext for . . . discrimination." See also Connell v. Bank of Boston, 924 F.2d 1169, 1175, 1177 (1st Cir. 1991), cert. denied, 59 U.S.L.W. 3837 (U.S. June 18, 1991). It was on the basis of its conclusion that such "additional" evidence of discrimination was absent in the present case that the district court granted summary judgment in favor of Wellesley. (App. C-16). While the First Circuit, on appeal, disclaimed adherence to an "absolute rule that a discrimination plaintiff must adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail at the summary judgment stage or at trial" (App. A-7), it nevertheless went on to say that, depending on the facts and circumstances of each case, "additional evidence may be required." (App. A-7). And, despite the fact that petitioner adduced evidence from which the factfinder could infer that Wellesley's tenure standards had been applied unequally to petitioner and that its explanations for denying him tenure were not its real reasons, the court held that summary judgment was proper.

As Judge Bownes argued in his dissenting opinion in Connell v. Bank of Boston, 924 F.2d at 1182:

> The requirement that a plaintiff rebut an employer's articulated reasons and also directly prove . . . discrimination is contrary

> to the express teachings of the Supreme Court. All that is necessary to raise a genuine issue of fact in an employment discrimination case is that the plaintiff make out a prima facie case and successfully rebut as pretextual the employer's articulated reasons for the adverse action.

In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court held that an employer who has made out a prima facie case of discrimination can prevail with respect to his or her ultimate burden of proving that he or she is the victim of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256 (emphasis added). In the latter case, the evidence presented as part of the plaintiff's prima facie case retains its inherent probative force as evidence of illegal discrimination, see Furnco Constr. Co. v. Waters, 438 U.S. at 577 (1978), and must be considered along with evidence of pretext, in determining whether the plaintiff has presented sufficient evidence to go to the jury on his or her ultimate burden. Burdine, 450 U.S. at 256 n. 10. Plaintiff may even prevail, therefore, "where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." Id. at 256 n. 10.

Moreover, as the First Circuit itself acknowledged in Olivera, 922 F.2d at 47-48, "[a]t least nine circuits have held that the Burdine alternative language means that making out a prima facie case plus proving that the

articulated reason for the discharge was pretextual is sufficient, without more, to raise a genuine issue fact as to discrimination." See Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 464-465 (2d Cir. 1989) (summary judgment for employer reversed because "[a] showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated."); Fite v. First Tennessee Production Credit Ass'n, 861 F.2d 884, 890-891 (6th Cir. 1988) (employer's motion for directed verdict properly denied because jury could have found that the employer's reason for discharge was a mere pretext); Samarzia v. Clark County, 859 F.2d 88, 91-92 (9th Cir. 1988) (same); Overgard v. Cambridge Bank Co., 858 F.2d 371, 375-376 (7th Cir. 1988) ("If the plaintiff can convince the trier of fact that the defendant did not act for the reason it offers as justification, then the defendant has not met its burden and the plaintiff may thus prevail."); MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1057-1059 (8th Cir. 1988) ("an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred"); Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1000 (3rd Cir. 1988) ("A showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated."); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1562-1564 (11th Cir. 1987) (summary judgment for employer reversed because employer raised genuine issue of material fact as to whether employer's articulated reasons for discharge was pretextual); Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 33, 646 (5th Cir. 1985) ("In the context of a summary judgment proceeding, the question is

not whether the plaintiff proves pretext but rather whether the plaintiff raises a genuine issue of fact regarding pretext."); Krodel v. Young, 748 F.2d 701, 707-708 (D.C. Cir. 1984), cert. denied, 474 U.S. 817 (1985) (Burdine and Aikens "make clear that an ADEA plaintiff who has established a prima facie case and has effectively discredited the employer's proffered justification need not, in all cases, submit additional evidence concerning the particular employment decision at issue in order to demonstrate that age was a determining factor in the employer's action.").

The First Circuit's rule that a Title VII plaintiff may be required to do more than make out a prima facie case and raise a genuine issue of fact as to whether the employer's explanation is pretextual in order to survive summary judgment substantially undermines the analytical framework for the introduction of evidence and the allocation of the burden of proof established in McDonnell Douglas and followed consistently by this Court and virtually every Circuit. By abandoning the straightforward test that an inference of discrimination may be drawn from the employer's submission of a discredited explanation, the decision of the court below that "additional evidence" may be required is also at war with the fundamental principle that on a motion for summary judgment the court should not weigh the evidence. It necessarily puts the court in the position of determining how much, if any, "additional" evidence is required to create a genuine issue of fact. Such a rule threatens the vitality of Title VII as an effective remedy for racial and sexual discrimination in the workplace and should be rejected by this Court.

CONCLUSION

This case presents important questions regarding the application of Title VII in an academic context and the standard for evaluating the evidence at the summary judgment stage. This Court should grant certiorari to review the decision of the First Circuit which decided each issue in a way that substantially diminishes the protection that was intended to be afforded to minority employees by Title VII of the Civil Rights Act of 1964.

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Dated: July 17, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1898

TINO VILLANUEVA,
Plaintiff, Appellant,

v.

WELLESLEY COLLEGE,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, U.S. District Judge]

Before

Breyer, Chief Judge,

Campbell and Torruella, Circuit Judges.

Jonathan Shapiro, with whom Stern & Shapiro, was on brief for appellant.

John H. Mason, with whom Philip C. Curtis and Ropes & Gray, were on brief for appellee.

April 19, 1991

TORRUELLA, Circuit Judge. This appeal presents an intersection of three areas of law: the summary judgment standard; the burden-shifting analysis in employment discrimination cases; and the special considerations relevant to employment discrimination in the milieu of academic tenure decisions. Our negotiation of this junction leads us to affirm the grant of summary judgment in favor of defendant-appellee Wellesley College.

BACKGROUND

Tino Villanueva, a poet and a specialist in Chicano[1/] literature, joined the Wellesley faculty in 1974 as a part-time instructor in the Spanish Department. After completing the requirements for a Ph.D. in 1981, he was promoted to a full-time, tenure-track assistant professorship. In 1985 he became eligible for tenure. The Spanish Department Reappointment & Promotions Committee (R&P Committee"), comprising the tenured members of the department, recommended against granting Villanueva tenure by a vote of three to one, with only the department chair dissenting. The Committee on Faculty Appointments ("CFA"), composed of representatives from the entire college and responsible for final tenure decisions, voted to accept the R&P Committee's recommendation and, upon Villanueva's request for reconsideration, again voted against tenure. In accordance

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[1/] The term "Chicano" refers to Mexican-Americans and their culture. It is thought to derive from either a Mexican Spanish dialectal pronunciation of "Mexicano," or from a combination of the words "Chihuahua" and "Mexicano." See The Barnhart Dictionary of Etymology (1988); 2 Encyclopedia Britannica Micropaedia (1984).

with its usual procedure when tenure has been denied, Wellesley terminated Villanueva's employment effective at the end of a one-year terminal appointment.

Villanueva filed charges with the Equal Employment Opportunity Commission ("EEOC") and the Massachusetts Commission Against Discrimination ("MCADP") alleging that Wellesley had denied him tenure and terminated his employment on account of his race, color, national origin, sex and age. The EEOC informed Villanueva that it found no reasonable cause to believe that his allegations were true and that he had a right to commence suit; the MCAD also issued a lack of probable cause finding.

This action followed. Villanueva's amended complaint stated violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; the Civil Rights Act of 1866, 42 U.S.C. §1981; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq.; and the employment discrimination provision of Massachusetts law, Mass. Gen. L. ch. 151B, §§4 (1) and (1B).[2/] After completion of discovery, Wellesley filed motions for summary judgment on all claims. The case was referred

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[2/] We do not distinguish further among the various statutes, as the standards of liability under all are substantially identical. See Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 62 n.1 (1st Cir.) (Title VII and §1981 create similar rights in cases of employment discrimination), cert. denied, 454 U.S. 1098 (1981); Loeb v. Textron, 600 F.2d 1003, 1015 (1st Cir. 1979) (Title VII standards apply to age discrimination action); McKenzie v. Brigham & Women's Hosp., 541 N.E.2d 325, 327 (Mass. 1989) (Massachusetts applies Title VII standards to its own antidiscrimination statute).

to a magistrate who, in a comprehensive written opinion, recommended that the court grant Wellesley's motions for summary judgment. The district court agreed and entered judgment for Wellesley. Villanueva appealed.

THE LEGAL STANDARDS

Summary judgment is to be:

> rendered forthwith if the pleadings, depositions, answers or interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56. We exercise plenary review of summary judgment. Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 45 (1st Cir. 1990). In so doing, we view all the facts in the light most favorable to the non-moving party and indulge all inferences advantageous to that party, provided they arise reasonably from the record. Id.

The three-step burden-shifting analysis used in the majority of differential treatment employment discrimination cases is by now so familiar that it need not be fully explored here. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); see also Olivera, 922 F.2d at 46-47 (summarizing Supreme Court employment discrimination doctrine). In cases where there is no direct evidence of discrimination (the McDonnell Douglas prima facie case)

the burden shifts to the defendant to articulate a nondiscriminatory justification for its decision; and when that burden is met, the plaintiff must produce evidence that the defendant's reasons "were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253. Importantly, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id.

As the first two elements of the McDonnell Douglas model are quite easy to meet, it is not surprising that most cases, like this one, come to rest on the third step. At the summary judgment stage, "when, as here, the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990); see also Mezel v. Western Auto Supply Co., 848 F.2d 327, 329-30 (1st Cir. 1988); Menard v. First Security Services Corp., 848 F.2d 281, 287 (1st Cir. 1988); Dea v. Look, 810 F.2d 12, 15-16 (1st Cir. 1987); Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1, 14 (1st Cir. 1985) (Campbell, J., concurring), cert. denied, 475 U.S. 1097 (1986). The plaintiff must do more than cast doubt on the wisdom of the employer's justification; to defeat summary judgment, the plaintiff must introduce evidence that the real reason for the employer's action was discrimination. Medina-Munoz, 896 F.2d at 9; Menard, 848 F.2d at 287.

This requirement does not place a burden on the plaintiff

in addition to that outlined in McDonnell Douglas. Cf. Connell v. Bank of Boston, No. 90-116-, slip op. at 31 (1st Cir. Jan. 28, 1991) (Bownes, J., dissenting) (suggesting that this circuit has added to the plaintiff's burden). Rather, the requirement springs from the mandate of Rule 56. Rule 56 requires the non-moving party to demonstrate the existence of a dispute of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In order to create a dispute of material fact, a discrimination plaintiff must raise an inference of discriminatory motive underlying the pretextual explanation. Medina-Munoz, 896 F.2d at 9. Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact. Only if there is evidence from which a reasonable inference of discrimination can be drawn has the plaintiff defeated the summary judgment motion.

It was suggested at oral argument in this case that a mechanical application of the McDonnell Douglas framework was the correct one. Under that analysis, once a plaintiff has produced evidence of pretext, the employer's justification vanishes and the original McDonnell Douglas inference of discrimination rises again, automatically overcoming summary judgment. We reject that formalistic approach as not in keeping with either Supreme Court doctrine or common sense. See Furnco Constr. Co., v. Waters, 438 U.S. 567, 577 (1978) (the McDonnell Douglas model "was not intended to be rigid, mechanized or ritualistic"). Depending on the facts and circumstances of each case, the original prima facie case plus the evidence of pretext may suffice to raise an

inference of discrimination, or additional evidence may be required. There is no absolute rule that a discrimination plaintiff must adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial. See Connell, slip op. at 5 n.3; but see Olivera, 922 F.2d at 48 (stating that in this circuit a plaintiff must adduce additional evidence of discrimination). "Rather, the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by [discriminatory] animus." Connell, slip op. at 5 n.3 (emphasis added). If no such inference can be drawn, summary judgment is appropriate.

Where the basis of an employment discrimination suit is a denial of tenure, some special considerations apply. First, a plaintiff raises an initial inference of discrimination by adducing proof:

> (1) that plaintiff is a member of the protected group;
>
> (2) that plaintiff was a candidate for tenure and was qualified under the college or university's standards, practices of customs;
>
> (3) that despite these qualifications plaintiff was rejected; and
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> (4) that tenured positions in the relevant department remained open at the time plaintiff was denied tenure, in that others were granted tenure in the department

during the same general time period.

Banerjee v. Board of Trustees of Smith College, F.2d 61, 62 (1st Cir.), cert. denied, 454 U.S. 1098 (1981). As to the second element, the plaintiff need only show that his or her qualifications were at least comparable to those of a "middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise by the tenure decision-making body." Id. at 63.

A second consideration stressed in our tenure decisions is that it is not the function of the courts to sit as "supertenure" committees. See Brown v. Trustees of Boston Univ. 891 F.2d 337, 345-46 (1st Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990); Kumar, 774 F.2d at 10-11; Kumar, 774 F.2d at 12 (Campbell, J., concurring); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175-76 (1st Cir.), rev'd on other grounds, 439 U.S. 24 (1978). We are hesitant to intrude upon academic freedom, which, "although not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); see also Sweezy v. New Hampshire, 354 U.S. 234, 261-63 (1957) (Frankfurter, J., concurring); Vargas-Figueroa v. Saldana, 826 F.2d 160, 162-63 (1st Cir. 1987) ("Courts have wisely recognized the importance of allowing universities to run their own affairs (and to make their own mistakes). To do otherwise threatens the diversity of thought, speech, teaching and research both within and among universities upon which free academic life depends."). At the same time, we recognize that Congress has committed to the federal courts a duty which we may not abdicate: that of

eliminating workplace discrimination, within educational settings as well as without. Brown, 891 F.2d at 346. Academic freedom does not embrace the freedom to discriminate. Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir.). cert. denied, 439 U.S. 984 (1978).

This delicate equilibrium is particularly significant at the third step of the McDonnell Douglas order of proof. To prevail at trial, a plaintiff must convince a trier of fact, by a preponderance of the evidence, that the defendant's articulated reasons for denying tenure

> were "obviously weak or implausible," or that the tenure standards for prevailing at the tenure decisions were "manifestly unequally applied." The essential words here are "obviously" and "manifestly." A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.

Brown, 891 F.2d at 346 (quoting Kumar, 774 F.2d at 15 (Campbell, J., concurring)). We must consider the appropriateness of summary judgment in light of this statement of the plaintiff's ultimate burden at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. at 252.

THE EVIDENCE

Tino Villanueva has made out a prima facie case.[3] he is a member of a protected class -- indeed, several (his complaint describes him as a "brown-skinned male of Mexican-American ancestry", age forty-four at the time of the tenure decisions). We find that undisputed material evidence demonstrates that he was qualified for tenure under the Banerjee standard, which requires only that a plaintiff be among a "middle group" of tenure candidates. Banerjee, 648 F.2d at 63. And he was turned down for tenure while other candidates were approved in the same general period of time.

There is also no doubt that Wellesley has articulated a legitimate, nondiscriminatory reason for its tenure decision. The R&P Committee and the CFA both stated their reasons in contemporaneous written documents. Essentially, both committees found that Villanueva was not sufficiently excellent in any of the five categories Wellesley used to evaluate tenure potential: teaching, scholarship, relation of the candidate to the department's structure, service to the college community and external professional activities.[4]

As to teaching, the committees found that Villanueva was not outstanding. The student evaluations of his performance were not as positive as those presented in most language department tenure cases. The R&P

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[3] The lower court did not specifically resolve this issue, but merely assumed for the purposes of the summary judgment motion that plaintiff had made out a prima facie case.

[4] The fifth category, external professional activities, does not appear to have factored into Villanueva's case.

Committee was stronger in its criticism of Villanueva's teaching performance that was the CFA: It found his pace too slow, his pedagogical priorities too independent from those of the department, and his level of literary analysis low.

In the area of scholarship, again the R&P Committee issued a lower report than did the CFA. Although the CFA did not question the quantity of Villanueva's published work, it found that letters from outside evaluators indicated a sense of reservation as to the merits of this work. In most tenure cases the evaluations were more enthusiastic. The R&P Committee concluded that Villanueva had spun the same theme into too many of his published articles,[5/] and it also considered his productivity to be inadequate. Both committees acknowledged Villanueva's accomplishments as a poet.

The Committees did not consider Villanueva's service to the community to be strong. The CFA criticized his lack of initiative, while the R&P Committee found that, despite requests from the department for more participation, Villanueva's presence in the Wellesley community was inadequate.

Department structure also received some consideration by the committees. At the time of Villanueva's tenure application, Wellesley had a mandatory retirement age of

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[5/] Of eight published articles by Villanueva, four were based upon his dissertation and four dealt with related aspects of Chicano history and literature.

70.[9] Three of the four tenured members of the Spanish Department were scheduled to retire in the years 2012 and 2013. Villanueva, if tenured, would have retired in 2011. The R&P Committee in particular believed that, in a small department, the consequences of this structure would be adverse. Also considered was the fact that a very strong candidate, Marjorie Agosin, was eligible for tenure the year after Villanueva. If both Villanueva and Agosin received tenure, the Spanish Department, with only six full-time and four part-time faculty members, would have been almost fully tenured. The CFA acknowledged the structural problems, but also noted that if Villanueva's teaching and scholarship credentials had been stronger, it would have granted tenure despite the department structure.

In sum, Wellesley plainly articulated a legitimate and nondiscriminatory reason for its decision to deny Villanueva tenure. The consensus of the CFA was that Villanueva's qualifications were adequate but not outstanding, and that given the structure of the Spanish Department and the reservations expressed by the R&P Committee, a grant of tenure was inadvisable.

Villanueva took two approaches to rebutting Wellesley's

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[9] This requirement, which was legal at the time, has since been repealed. To the extent that Villanueva suggests that basing the tenure decision on the criteria of department structure is age discrimination per se, we disagree. The department structure analysis looks at the relative age of the faculty, not the absolute age. Thus, it was irrelevant whether Villanueva was thirty or fifty at the time of the tenure decision; it mattered only when his retirement would occur compared to others in the department.

justification. First, he attempted to show that he had been subjected to a higher standard than that applied to other tenure candidates in the Spanish Department. To support this claim Villanueva compared various aspects of his tenure record with those of the four professors, all white women, who had been granted tenure in the years surrounding his own tenure application. Villanueva's evidence, taken most favorably to him, demonstrates that in some areas he may have been more qualified that the other candidates. Second, Villanueva introduced statistics in an effort to demonstrate a pattern of discriminatory employment practices at Wellesley.

DISCUSSION

In our judgment, Villanueva failed to rebut Wellesley's justification. Although Villanueva has presented evidence showing that he was qualified for tenure, he has not demonstrated that Wellesley's justification was a pretext; a fortiori, he has not shown that it was a pretext for discrimination.

Two of the professors with whom Villanueva compared himself received tenure six to eight years before he became eligible. Comparisons over such a length of time are simply not probative, especially where, as here, the structure of the relevant department had changed quite dramatically during the intervening years. See Banerjee, 648 F.2d at 62. Therefore the two relevant candidates for comparative purposes are Joy Renjilian-Burgy, who received tenure in the 1984-85 academic year, and Marjorie Agosin, tenured in 1987-88. As to these candidates, the undisputed evidence shows that while their qualifications may have been less than or equal to

Villanueva's in certain areas, both Renjilian-Burgy and Agosin excelled in other areas. Renjilian-Burgy had received a number of teaching awards, and Agosin was extraordinarily active in her service to the college community.

At any rate, it is not our task to determine which of the candidates would have been Wellesley's best choice for tenure. Villanueva was required to adduce sufficient evidence from which a trier of fact could conclude that Wellesley's articulated reason for the tenure decision was "obviously weak or implausible," or that the standards were "manifestly unequally applied." Brown, 891 F.2d at 346 (quoting Kumar, 774 F.2d at 15 (Campbell, J., concurring)). Introducing evidence that, at best, indicates that he was as qualified as other tenure candidates does not suffice.

Moreover, nothing in Villanueva's comparative evidence raises the slightest inference that a discriminatory motive lurked beneath the surface. For this showing, Villanueva relied upon certain statistics showing that the percentage of minority faculty members at Wellesley ranged from 2.3% to 3.89% during the years 1979-1987. These statistics, however, are inadequate absent some further indication of their relevance. See e.g., Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1783 (1989) (citing expert testimony that women partnership candidates' uniqueness among an otherwise all-male candidate group increased the likelihood that critical remarks were the product of stereotyping); Wards Cove v. Antonio. 490 U.S. 642, 650-1 (1989) (requiring, in a disparate impact case, information about the composition of the relevant labor market in order to raise an inference of discrimination).

Villanueva's evidence on pretext may raise doubts about the wisdom of Wellesley's tenure decisions. But "[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent." Menard, 848 F.2d at 287. Rather:

> [T]he evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievements and to act upon the good faith judgments of their departmental faculties or reviewing authorities.

Zahorik v. Cornell Univ., 729 F.2d 85, 94 (2d Cir. 1984). It is apparent from the record that reasonable people could differ, and have differed, as to Villanueva's qualifications for tenure. But we may not, and cannot, resolve the dispute; it is not for us to determine whether one professor is a more inspiring teacher, or another a more insightful scholar. Those are matters intertwined with academic freedom, not discrimination protected by law. Merely by showing that such a dispute exists, Wellesley has successfully dispelled any inference of discrimination, and none of Villanueva's evidence has brought it back.

We conclude that the undisputed evidence does not raise a genuine issue of material fact as to differential treatment based on impermissible discrimination. Summary judgment was therefore proper and is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TINO VILLANUEVA,
Plaintiff

v.

WELLESLEY COLLEGE,
Defendant

NELSON, D.J. August 17, 1990

ORDER

Defendant filed motions for summary judgment (##12S & 16S) in this employment discrimination action. Plaintiff opposed the motions. Pursuant to the Court's order of reference, Magistrate Cohen issued a Report and Recommendation on defendant's motions dated June 14, 1990 ("Report"). The Report recommends that the Court should allow defendant's motions for summary judgment. Plaintiff filed timely objections to the Report and submitted a memorandum in support of his objections.

Upon a de novo review of the parties' submissions and the record, the Court reaches findings and conclusions consistent with the Report. With specific reference to plaintiff's objections to the Report, the Court finds that no

rational trier of fact could conclude on the basis of the record before the Court that the reason given by Wellesley College for denying plaintiff tenure "was not only a sham, but a sham intended to cover up the employer's real motive: [improper] discrimination." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990). Accordingly, the Court allows and adopts the Report's recommendations and enters the following order:

Defendant's motions for summary judgment are allowed for the reasons set forth in the magistrate's Report. Judgment shall accordingly be entered in favor of defendant.

SO ORDERED.

David S. Nelson
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
87-2022-N

TINO VILLANUEVA

Plaintiff

v.

WELLESLEY COLLEGE

Defendant

REPORT AND RECOMMENDATION

June 14, 1990

COHEN, M.

This is an employment discrimination case. Plaintiff's claims arise from defendant's denial of plaintiff's application for tenure. Plaintiff alleges he was denied tenure on account of his race, color, national origin, age and sex. Plaintiff asserts his denial of tenure violates 1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq., 2) the Civil Rights Acts of 1866, 42 U.S.C. §1981, 3) the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq., and 4) M.G.L.

c.151B, §§4 (a) and (1B).[1/] Defendant has filed motions for summary judgment (## 12S, 16S), and plaintiff has filed an opposition to those motions.

I. Historical Facts

Plaintiff, Tino Villanueva ("Villanueva"), a male, born of Mexican-American ancestry, was a faculty member in the Spanish Department at Wellesley College ("Wellesley"). Defendant Wellesley is a non-profit educational corporation chartered under the laws of the Commonwealth of Massachusetts.

In 1969, plaintiff received his B.A. degree from Southwest Texas State University. In 1971, he received his M.A. degree in Romance Languages from the State University of New York. In 1974, while attending Boston University as a candidate for his Ph.D. degree in Romance Languages, plaintiff was appointed as a part-time instructor in the Spanish Department at Wellesley. In 1981, plaintiff received his Ph.D. and Wellesley promoted Villanueva from his position as part-time instructor, to a full-time tenure track Assistant Professor.

In 1985, plaintiff was reviewed for tenure pursuant to the formal tenure procedures Wellesley established for its faculty. These tenure procedures are set forth in the Articles of Government of Wellesley College. (Exhibit A, attached to Wellesley's Memorandum in Support of its

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[1/] The case is properly before this court. Plaintiff exhausted his administrative remedies. The EEOC issued a determination that there was no probable cause and a right to sue letter. The action was timely filed.

Motion for Summary Judgment, #17). The Articles of Government establishes a Reappointments and Promotions Committee ("R & P Committee") for each of the departments within Wellesley. Each R & P Committee consists of the respective department's tenured members. Initial recommendations regarding tenure are made by the R & P Committee for the particular department involved.

The R & P Committee judges a candidate's qualifications for tenure pursuant to the guidelines set forth in the Articles of Government. These guidelines are 1) teaching, 2) scholarship, 3) structure of the department, 4) service to Wellesley, and 5) external professional activities.

The R & P Committee submits its recommendation to the Committee on Faculty Appointments ("CFA"). The CFA consists of five tenured faculty members elected by the faculty at large, the dean, the president, and a black tenured faculty member elected by the black faculty.

In October, 1985, the R & P Committee of the Spanish Department, despite the dissent of the department chair, recommended against granting plaintiff tenure. In December 1985, the CFA voted to accept the R & P Committee's decision against tenure. Plaintiff petitioned the CFA to reconsider. In April 1986, the CFA voted a second time, and again voted against tenure. Pursuant to the Articles of Government, a candidate who is denied tenure must leave Wellesley one year after the decision against tenure is made. Subsequently, plaintiff's

employment at Wellesley terminated in the spring of 1987.[2/]

II. Applicable Legal Principles

A. Summary Judgment Standard

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986) (quoting Fed. R. Civ. P. 1).

To survive a motion for summary judgment, the opposing party must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P., 56(e); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1248, 1355-56 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). That is, the inquiry focusses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 1512. "Where the record taken as whole could not lead a rational trier of fact to find for the

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[2/] Other material facts are set forth below as necessary. To the extent that other material facts are referred to during the course of the legal discussion set forth below, this court relies only on the undisputed facts established by the relevant Rule 18 [Rule 18 of the Local Rules of this Court] statements.

non-moving party, there is no 'genuine issue for trial.'" Matsushita, 106 S.Ct. at 1356 (citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)).

A plaintiff may not obtain a trial merely on the allegations in its complaint, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-290 (1968), or by showing that there is "some metaphysical doubt as to the material facts," Matsushita, supra, 106 S.Ct. at 1356 (citations omitted). Where the non-moving party will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment against that party where it "fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . ." Celotex Corp. v. Catrett, 106 S.Ct. at 2553. That is to say, to avoid summary judgment, the opposing party" . . . must produce at least some evidence reasonably affording an inference supporting the existence of a triable issue of fact [with respect to the element which the opposing party must establish at trial]." Santiago, et al. v. Group Brasil, Inc., 830 F.2d 413, 416 (1st Cir. 1987).[3/]

[3/] This standard applies equally to employment discrimination claims, even though "motive" and/or "intent are often relevant factors in the analysis of the claims. See Jose Medina-Munoz v. R. J. Reynolds Tobacco Company, 896 F.2d 5, 8 (lst Cir. 1990) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.").

B. Title VII - Burdens of Proof

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination ont he basis of race, color, religion, sex, or national origin. See 42 U.S.C. §2000e-2(a)(1). In a Title VII case, the ultimate factual question is whether a defendant intentionally discriminated against a plaintiff on the basis of race, color, religion, sex or national origin. Oliver v. Digital Equipment Corp., 846 F.2d 103, 106 (1st Cir. 1988). Intentional discrimination may be established by either of two methods. First, a plaintiff may establish intentional discrimination by direct evidence.[4] Secondly, a plaintiff may show discriminatory intent by a proffer of circumstantial evidence sufficient to support an inference of discrimination. Id., at 107.[5] Plaintiff relies on this second method.

The McDonnell Douglas test, which set forth the order and allocation of the burdens of proof for a Title VII disparate treatment claim, was clarified in Texas Department of Community Affairs v. Burdine, 450 U.S. 148 (1980). In Burdine the Supreme Court stated,

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima

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[4] Insofar as this court can determine, plaintiff has not in his opposition to defendant's motion for summary judgment, offered any direct evidence of improper discriminatory intent.

[5] The so-called "disparate treatment" analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

> facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine at 152-53; quoting McDonnell Douglas at 802.[9/]

[9/] On the matter of the ultimate burden of proof, the United States Court of Appeals for this Circuit has recently observed (Jose Medina-Munoz v. R.J. Reynolds Tobacco Company, 896 F.2d 5, 9 (1st Cir. 1990)) --

> To achieve this plateau, an ADEA plaintiff must do more than simply refute or cast doubt on the company's rationale for the adverse action. The plaintiff must also show a discriminatory animus based on age. (Emphasis added).

It also observed the interplay between the burden-shifting analysis and the summary judgment standard under Rule 56, F.R. Civ. P. (Id.) --

> Generally speaking, the principles discussed above abide at the summary judgment stage. Most pertinent for our purposes, it remains true that when, as here, the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the

1) The Prima Facie Case

Under the McDonnell Douglas framework, the plaintiff must first establish a prima facie case of discrimination. The plaintiff could carry this initial burden by demonstrating:

(i) that he belongs to a minority;
(ii) that he applied and was qualified for a job for which Wellesley was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that after his rejection, tenure positions remained open at Wellesley evidenced by the fact that others were granted tenure in the Spanish department during a period relatively near to the time plaintiff was denied tenure.

Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 62 (1st Cir. 1981); McDonnell Douglas, 411 U.S. at 802.

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reason given was not only a sham, but a sham intended to cover up the employer's real motive: age discrimination.

Except for the identity of the class protected, the burden-shifting analysis in ADEA cases and other employment discrimination [race, national origin, sex, etc.] is functionally the same.

This court assumes, for purposes of defendant's motion for summary judgment only, that plaintiff, on the basis of the undisputed material facts, has established a prima facie case.[2/]

[2/] In its motion for summary judgment, Wellesley contends that plaintiff has not shown -- and cannot show -- that he was qualified for tenure. Although Wellesley's argument on this score is far from superficial, particularly within the context of the recognition that a university must be given a great deal of autonomy in making lawful tenure decisions in the academic environment, see e.g., Brown v. Trustees of Boston University, 891 F.2d 337, 346 (1st Cir. 1989), and text, pp. 15, 16, 17-15, 16, 17, infra, there is no need to decide that issue at this time for the reasons set forth in the text below. In passing, however, this court notes that the undisputed material evidence shows that he may well have been in the "middle group" of tenure candidates. See Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir. 1981). Among that undisputed evidence is the following: A letter written by Dean Chaplin and Associate Dean Stettner which summarizes the CFA's decision against tenure. This letter emphasizes that the decision was discussed at length before voting and that the decision was difficult. The letter states, "the decision was not an easy one, and the Committee certainly saw many strengths in your case." (Exhibit 47, attached to Supplemental Affidavit of Ruth Anne Nuwayser, docket #20).

Additionally, Professor Gabriel H. Lovett, a member of the Spanish Department's R & P Committee who voted in favor of granting plaintiff tenure, wrote to the CFA and provided them with a list of plaintiff's accomplishments. Professor Lovett concluded this letter in support of plaintiff by stating that plaintiff "is an indispensable member of the department . . . I recommend him enthusiastically for tenure." (Exhibit 33, attached to Supplemental Affidavit of Ruth Anne Nuwayser, docket #20).

2) Legitimate Nondiscriminatory Reasons

After the R & P Committee voted against granting tenure to plaintiff, a majority of the R & P Committee sent a letter to the CFA articulating their reasons. This letter focused on plaintiff's qualifications pursuant to the guidelines set forth in the Articles of Government.

In the area of teaching, the R & P majority found that plaintiff's pace was slow; that his student evaluations ("SEQs") were not of the superior quality the R & P Committee was seeking in a tenured professor; that plaintiff's pedagogical priorities were inappropriately independent of those set by the Spanish department; and that his level of literary analysis was low.

In the area of scholarship, while the R & P Committee acknowledged plaintiff's activities as a poet, they found repetition in his listing on published articles; that his dissertion should have been transformed into a published book; that his critical methodology while sound, was not current and that he had not written any book reviews, nor spoken at any professional meetings, nor presented any papers to his colleagues.

In the area of service to the department and college, the R & P Committee majority found plaintiff adequate but passive. While plaintiff was helpful in participating in the

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The CFA voted against granting plaintiff tenure by a five to three vote, indicating, at the very least, that at least three members of the CFA, all of whom are more intimate with the academic environment, concluded that plaintiff was qualified for tenure.

various activities sponsored by the department, he never held roles with major responsibilities nor promoted any activities himself. It was suggested to plaintiff in the past that he make himself more visible on campus, speak up at department meetings, join college committees, and in general make more of a personal contribution to Wellesley. The R & P Committee majority noted some improvements in these areas but nonetheless maintained plaintiff's presence was not sufficiently felt at Wellesley.

In the area of the Spanish department's structure, the R & P Committee majority noted that three of the tenured members are due to retire between 2007 - 2009.[1] If plaintiff was tenured, he would bring this number to four, since he, too, would be slated to retire in 2007. The R & P Committee majority acknowledged that, if they had a larger Spanish department, plaintiff would be a more likely candidate for tenure. The R & P Committee majority also acknowledged that they took into account the fact that Ms. Agosin, who would become a candidate for tenure the year following plaintiff, had impressive credentials. She would be slated to retire in 2020. With the above in mind, the R & P Committee majority concluded plaintiff was not the best candidate for tenure.

Dean Maud H. Chaplin and Associate Dean Edward A. Stettner, articulated the reasons the CFA voted to deny plaintiff tenure. The CFA was greatly influenced by the recommendation of the R & P Committee. As to teaching,

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[1] At the time that plaintiff applied for tenure, Wellesley had -- consistent with the provisions of Title VII and state law -- a mandatory retirement age of 70. That mandatory retirement requirement has since been repealed.

the CFA differed from the R & P Committee in that it found plaintiff's teaching more than merely adequate, but nevertheless not outstanding. The CFA found the SEQs strong, but not as strong as SEQs found in most language department tenure cases. Accepting the critique of the R & P Committee majority, the CFA found plaintiff's teaching to be at too slow a pace, that too much English was used in his classes, and that plaintiff did not employ the latest teaching techniques.

As to scholarly strength and growth, again the CFA relied on the comments of plaintiff's R & P Committee, plus outside evaluations. The CFA felt the outside letters were positive, but carried a tone which indicated a sense of reservation. The CFA concluded that many of the letters in tenure cases were more enthusiastic. The CFA was convinced that plaintiff was an active scholar and never questioned the quantity of plaintiff's work.

As to service, while plaintiff was found to be a cooperative colleague, he was also found not to take many initiatives in the work of the Spanish department. The CFA gave weight to the fact that the department consisted of a number of strong-willed members, each of whom had ideas regarding how to develop the department. The CFA found plaintiff's service to be good but not strong.

As to the structure of the department, it was discussed that Agosin was up for tenure in the following year and that if plaintiff and Agosin were both given tenure the small department would be almost fully tenured. The CFA noted that this was a strong consideration for members of the R & P Committee and some members of the CFA; however, the CFA also noted that if plaintiff's credentials

were stronger in teaching and scholarly strength, it was unlikely that the CFA would have accepted the R & P Committee's negative tenure decision. The CFA also noted that while the issue of native and non-native speakers sometimes arises in language department tenure decisions, in plaintiff's case it had not been discussed. Additionally, the CFA did not discuss the R & P Committee's desire that students hear male as well as female voices in the department.[9/]

In these circumstances, it is clear that Wellesley has met its burden of articulating a legitimate, nondiscriminatory reasons for denying plaintiff tenure.[10/]

3) Whether Articulated Reasons Are Pretextual

(a) In contending that defendant's articulated reason for denial of tenure was merely pretextual, the majority of plaintiff's arguments center on the fact that he was as qualified, if not more qualified, for tenure as were four white women who were granted tenure. Plaintiff's points, with defendant's counterpoints appended as

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[9/] All of the reasons stated above are set forth in contemporaneous reports and/or letters made at or about the time of the decision not to grant tenure to the plaintiff, matters offered by defendant in support of its motion for summary judgment without objection. None was based on depositions of the various members of the R & P Committee or the CFA committee.

[10/] And, insofar as this court can determine, plaintiff does not contend to the contrary.

footnotes,[11/] are set forth below.[12/]

The four white women granted tenure were Ms. Gascon-Vera, Ms. Roses and Ms. Renjilian-Burgy, all before plaintiff's tenure application, and Ms. Agosin, after plaintiff's tenure application. Plaintiff has compared his qualifications with the qualifications of these women in each of the five areas of critique. He has raised numerous factual disputes in each of the five areas.

[11/] The indicated conflicts do not represent genuine disputes as to the underlying facts as such, but conflict only insofar as what inferences may be drawn therefrom. This court is aware that (Medina-Munoz, supra at 9 n.3) --

> Strong evidence is not necessarily uncontradicted evidence; and at the summary judgment stage, the district judge cannot "superimpose his own ideas of probability and likelihood (no matter how reasonable those ideas may be) upon the [facts of] record." Greenburg v. Puerto Rico Maritime Shipping Auth., 835 F.2d 932, 936 (1st Cir. 1987).

With this caveat in mind, the points and counterpoints are presented in order to determine whether any rational trier of fact could find for the plaintiff on his claim that the proffered reasons advanced were merely pretextual.

[12/] For purposes of defendant's motions for summary judgment, this court does not rely on those portions of depositions of Professors Gabriel Lovett and David Ferry insofar as they opine as to the motivations of others. See Motion to Strike (#27).

Upon review of plaintiff's teaching ability, which includes his students' SEQs and classroom evaluations, plaintiff emerges as a good, but not exceptional, teacher. Plaintiff, himself, recognizes that the teaching abilities of Ms. Renjilian-Burgy were superior to his own. He argues that he was compared to the superior teaching performance of Ms. Renjilian-Burgy while Ms. Gascon-Vera, Ms. Roses, and Ms. Agosin were tenured with lesser teaching performances.[13/]

As evidence of a lack of scholarship on the part of Ms. Renjilian-Burgy, plaintiff points to the fact that she was awarded tenure before she finished her Ph.D.

[13/] That is not necessarily a given, however, inasmuch as defendant disputes the conclusions drawn by plaintiff. In the case of Ms. Renjilian-Burgy, she excelled in her teaching performance. In 1982, Ms. Renjilian-Burgy received the Massachusetts Teacher of the Year award from the Spanish Heritage Society, and in 1983, Wellesley awarded her the Pinanski prize for excellence in teaching. Moreover, Ms. Gascon-Vera and Ms. Roses were granted tenure in the 1977-78 and 1979-80 school years, respectively, some seven to ten years before the consideration of plaintiff's application for tenure. At that time, the structure of the Spanish department was markedly different from the time when plaintiff was reviewed for tenure. In 1977-1980 the Spanish department was neither heavily tenured nor were the majority of those tenured slated to retire in close proximity to one another. This court nevertheless assumes plaintiff's point for purposes of the motion for summary judgment.

Plaintiff maintains his scholarship was superior to Ms. Roses and equal to Ms. Gascon-Vera and Ms. Agosin.[14/] Plaintiff says that he significantly contributed to Wellesley. As plaintiff points out, he gave numerous Chicano poetry recitals, was a participant on a panel at the Modern Language Association conference in December 1981, and edited his own journal Imagine.[15/]

(b) All of these points notwithstanding, and assuming that plaintiff has made his point -- i.e., that he was certainly qualified to be granted tenure -- plaintiff still falls far short in mustering sufficient evidence by which a rational trier of fact -- short of mere speculation or conjecture -- could reasonably conclude that the legitimate, non-discriminatory, reason advanced by Wellesley for denying his tenure bid was a pretext for illegal discrimination.

[14/] Again, however, Ms. Gascon-Vera and Ms. Roses were considered for tenure some seven to ten years prior to the application of plaintiff. See footnote 13, supra. See Benerjee v. Board of Trustees of Smith College, 648 F.2d 61 (1981)(Candidates must be compared to others granted tenure in a time period relatively near to the time of plaintiff's candidacy). And Ms. Agosin was extraordinarily active in her service to the Spanish department and in her participation in external professional activities.

[15/] Yet in comparison to plaintiff, Ms. Agosin was extraordinarily active. She served on the Advisory Board of the Massachusetts Foundation of the Arts and the New England Council on Latin-American Studies, was Chairperson of the International Institute of Sisterhood is Global, was coordinator of the PRESHCO program, and participated in programs such as Women's Studies, Jewish Studies, and Foreign Studies.

This is not a case of a licensed electrician or plumber.[16] It comes from a quite different mold. As the United States Court of Appeals has cautioned on more than one occasion --

> [C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions.

Brown v. Trustees of Boston University, 891 F.2d 337, 346 (1st Cir. 1989); quoting, Kumar v. Board of Trustees, University of Massachusetts, 774 F.2d 1, 12 (1st Cir.

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[16] Or, as stated by Judge Wyzanski (Kumar, supra, at 11), the analytical framework used in the context of a tenure case recognizes --

> the difference between the selection of a craftsman and of a professional. A bricklayer who can properly lay a specified number of bricks in a specified period is ordinarily as good as any other bricklayer likely to appear. But in the selection of a professor, . . . while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities.

1985)(Campbell, C.J., concurring), cert. denied, 475 U.S. 1097 (1986).

Because of that, plaintiff's showing -- that is, the showing required to survive the summary judgment hurdle -- differs from the run-of-the-mill employment discrimination case. To make that showing, plaintiff must produce enough evidence to convince a rational trier of fact that defendant's proffered reasons for denying tenure

> ...were "obviously weak or implausible", or that the tenure standards for prevailing at the tenure decisions were "manifestly unequally applied." Id. at 15. The essential words here are "obviously" and "manifestly." A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported. (Emphasis added).

Brown, supra, at 346, citing Kumar, supra.

Viewed in this context, this court finds and concludes that no rational trier of fact could reasonably conclude that the defendant's articulated legitimate, non-discriminatory, reason advanced for denying tenure to the plaintiff was "obviously weak or implausible", or that the decision in that instance was "manifestly unequally implied." That is to say, on the undisputed facts presented here, no rational trier of fact could reasonably conclude "...that the reason

given was not only a sham, but a sham intended to cover up the employer's real motive: [improper] discrimination." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)(Emphasis added).

Plaintiff contends, and this court so finds for purposes of his opposition to defendant's motion for summary judgment, that he was clearly qualified to receive tenure. But that is merely the initial inquiry. It is one matter to say that plaintiff otherwise qualified for an award of tenure. It is quite another to say, based on the evidence proffered by the plaintiff to date, including his statistical evidence,[17] that the R & P Committee, and the CFA Committee,[18] based their respective decisions on impermissible criteria.[19]

In addition to all that plaintiff has mustered in terms of his qualifications for tenure, and comparison of his qualifications for tenure with those who received it, plaintiff also points to certain statistical evidence.

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[17] The matter of statistics is discussed below.

[18] From all that appears in the filings of plaintiff, his claim is, more or less, institutional in nature, that is to say, it is directed against Wellesley qua Wellesley. He does not unequivocally contend that members of the R & P Committee were the malefactors, or both. It is clear, however, that the CFA Committee gave due -- albeit not blind -- deference to the conclusions reached by the majority of the R & P Committee.

[19] I.e., race, national origin, sex, or age. The analysis set forth in this portion of the report and recommendation addresses all bases for discrimination. Another aspect of the age discrimination claim is discussed infra.

Assuming all that plaintiff says on this score is true, that statistical evidence shows the following composition of faculty minorities[20/] at Wellesley for the years 1979-80 through 1987-88:

Year	Total Full-Time	Black	Hispanic	Min. %
1979-80	220	7(3.18%)	1(.45%)	3.64%
1980-81	230	5(2.17%)	2(.87%)	3.04%
1981-82	263	7(2.66%)	2(.76%)	3.42%
1982-83	260	5(1.92%)	1(.38%)	2.31%
1983-84	255	5(1.96%)	2(.78%)	2.75%
1984-85	260	7(2.92%)	2(.77%)	2.69%
1985-86	241	7(2.90%)	1(.41%)	3.73%
1986-87	283	7(2.97%)	4(1.41%)	3.89%

In this court's view, however, nothing in these statistics, considered singly or in combination with all other matters plaintiff has proffered, makes a showing that the legitimate, non-discriminatory reason for denial of tenure advanced by Wellesley was a sham to cover up an illegal discriminatory motive. On the matter of statistics, as Judge Woodlock of this court has recently observed (Jackson v. Harvard University, 721 F.Supp. 1397, 1431 (D. Mass. 1989) --

> Those figures [showing but three tenured women at the Business School of a tenured

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[20/] The statistics only relate to blacks and Hispanics. Plaintiff has offered no statistics concerning the composition of the Wellesley faculty in terms of sex or age.

> faculty of 84], while striking, are not in themselves particularly probative in a disparate treatment case. Nor, as the Supreme Court emphasized at the end of the past term, would such statistics be probative even if this case has been framed in terms of a disparate impact theory. Rejecting an analysis which found a prima facie case of employment discrimination solely on a statistical showing of a high percentage of white workers in a set of higher paying jobs and a low percentage of white workers in less desirable jobs, the Court firmly concluded that a pure proportionality approach "misapprehends our precedents and the purposes of Title III." Wards Cover Packing Co. v. Atonio, 109 S.Ct. 2115, 2121 (1989).
>
> "There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in [Hazelwood School Dist. v. United States, "that the... comparison...fundamentally misconceived the role of statistics in employment cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified... population in the relevant labor market." Ibid.

The plaintiff here offered no evidence linking the modest number of female tenured faculty to an analysis of the

qualified labor market for Harvard Business School professors. Rather, recognizing that the development of qualifications in such a labor market requires at a minimum a lengthy preparation process which is likely to include graduate education in a Business School, the plaintiff offered evidence concerning admissions to the Business School. However, as I discuss in the next section, the admissions statistics developed at trial were not helpful to plaintiff's case.

(Emphasis added).

Here, too, like in Jackson, the statistics proffered are far too little to prove anything. For example, the figures mean little absent additional information regarding the minority composition of the relevant labor market. Those figures might mean one thing if, for example, additional figures showed that a significant proportion of the relevant labor market applied for faculty positions at Wellesley and was rejected.[21/] But that is not the case here. More to the point, nothing is proffered vis a vis the "at-issue jobs", at least in terms of statistical evidence. That is to say, it may well be, absent some showing one way or another, that plaintiff was the sole applicant for the Spanish Department at Wellesley for the entire period of time

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[21/] Title VII should not be construed as an affirmative action statute. Kumar, supra at 10-11 (Wyzanski, D.J.). Accordingly, the statistics are meaningless absent some sort of showing that a significant proportion of minorities within the relevant labor market sought employment on the faculty at Wellesley, and were rejected.

covered by plaintiff's proffered statistics.[22] In these circumstances, plaintiff's statistics, like those in Jackson, supra, add nothing to his claim that the reasons given were but a sham designed to cover up improper motivation.

In short, plaintiff's tenure application may well have been a close call, one on which reasonable academicians could -- and, indeed, in this case did -- differ. But close calls are not a substitute for a showing that the reasons advanced were but pretext and sham designed to mask true [and improper] motives.[23] Plaintiff has not made, and

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[22] This is clearly not a matter of open and notorious knowledge. This court could readily assume, for example, that a significant portion of the minorities in the relevant labor market [whatever that might be, and it is not proffered here] would apply for the usual trades, crafts, and professions. That assumption, however, does not carry over to matters such as those who would seek admission on the faculty of the Spanish Department of any and/or all of the institutions of higher learning in the Greater Boston area, much less at Wellesley in particular.

Indeed, for aught that appears in the record, it might well be that all of the minorities referred to in the statistical analysis supplied by plaintiff were in the Spanish Department.

[23] One further point. Plaintiff allows (Memorandum of Law in Opposition to Defendant's Motions for Summary Judgment (#25, p. 9) that summary judgment is clearly inappropriate because, in the words of Burdine, supra, at 256, at trial plaintiff might prevail "'where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Here, however, as previously indicated, footnotes 7, 8 and 9, the reasons proffered were made openly and contemporaneously

cannot make, that showing in the circumstances of this case, and summary judgment is clearly appropriate.

III. The ADEA Claim

What has been said above applies equally to plaintiff's ADEA claim as well. In one regard, however, plaintiff focusses on one distinct point. As set forth above, pp. 9, 10, 12-9, 10, 12, supra, one reason advanced by the R & P Committee against an award of tenure to plaintiff was "structure". That is to say, if plaintiff was granted tenure, he would be slated for retirement in the year 2007, meaning that four tenured professors would be leaving the Spanish Department between the years 2007-2010. Believing that to be unwise in terms of the structure of the

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with the tenure decisions made by the R & P Committee and the CFA Committee, and those matters were offered as evidence by defendant in its motions for summary judgment without objection by plaintiff.

Plaintiff has deposed various members of the relevant committees, if not all, and had, at the very least, an opportunity to depose all of the members under Rule 56(f).

To date, plaintiff has not discredited the defendant's explanation. More to the point, even if, at trial, plaintiff was able to effectively cast doubt on the credibility and/or demeanor of the members of the various committees, defendant's contemporaneous explanations would remain intact, and the trier of fact could not properly draw an inference from demeanor evidence vis a vis the members of the respective committees that the opposite was true -- i.e., that those members voted against tenure on account of an impermissive factor. See e.g., Federal Insurance Company v. Summers, 403 F.2d 971, 974 (1st Cir. 1968); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), cert. denied, 382 U.S. 879 (1965).

Spanish Department, a majority of the R & P Committee believed that to be a negative factor.[24/]

The extent that plaintiff seemingly contends that that, in and of itself, is an indication of age bias, plaintiff simply misses the mark. Happenstance, not age, was the point at issue. If, for example, plaintiff was considered for tenure in 1980 [before he had reached the age of 40, and thus not within the protected class], the result would have been the same. That is to say, the "structure" issue would still have been extant, and still would have provided the same reason to recommend against tenure. In these circumstances, a rational juror could not reasonably conclude that the defendants denied tenure on account of his age.

[24/] In its report, the R & P Committee opined --

> Due to the size of the department and its structure (three tenured members are due to retire in 2007, 2008, and 2009, with [plaintiff] slated also for 2007) to tenure [plaintiff] would mean that we would all leave almost at the same time. If we were a large university department, it is more likely that there would be a slot for [plaintiff],...the next tenurable member [Ms. Agosin] who would retire in 2020, is also an known poet with four books of poetry, more than 30 scholarly articles and two books of criticism on Maria Luisa Bombal and Pablo Neruda. Also, [Ms. Agosin] has superior student evaluations, particularly in literature.

The R & P Committee Recommendation, Exhibit #34, p. 3.

IV. The Claims under 42 U.S.C. §1981

The McDonnell Douglas allocations of burdens of proof utilized in a Title VII disparate treatment analysis also apply to racial discrimination claims under §1981. See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987). Since plaintiff has not carried his burden under a Title VII analysis, he likewise has not carried it for purposes of a racial discrimination claim under §1981, the standards being the same.[25/]

V. Pendent State Law Claim (Mass.Gen.Laws, Ch. 151B)

Massachusetts courts have interpreted their own employment discrimination statute (Mass.Gen.Laws, Ch. 151B], including the burden-shifting approach, precisely in accord with Title VII and the ADEA. E.g., McKenzie v. Brigham & Women's Hosp., 541 N.E.2d 325, 327 (Mass. 1989), and cases cited therein.[26/] And the Massachusetts

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[25/] For these reasons, there is no occasion to determine whether a denial of tenure after the initial employment contract has been entered into is actionable under §1981. See Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363 (1989).

[26/] Observing, among other things, that if the employer advances a legitimate, non-discriminatory reason,

> "The reasons given for a decision may be unsound or even absurd, but if they are not discriminatory and if the plaintiff does not prove they ar pretexts, the plaintiff cannot prevail."

Id. (Quoting from Lewis v. Area II Homecare for Senior

Supreme Judicial Court, like the United States Court of Appeals for First Circuit in federal discrimination claim suits, has likewise concluded that summary judgment is appropriate absent a showing of a genuine issue of material fact. Id. at 328-29.

For the reasons stated above with respect to plaintiff's claims under Title VII, the ADEA, and §1981, plaintiff has not made out a genuine issue of material fact. Summary judgment on this claim is appropriate as well.

Citizens, Inc., 397 Mass. 761, 766 (1986).

VI. For the reasons set forth above, this court recommends[27] that the district judge allow defendant's motions for summary judgment (## 12S, 16S).

United States Magistrate

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[27] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. March 31, 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 454 U.S. 140, 106 S.Ct. 466 (1985).

Supreme Court, U.S.
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No. 91-105 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1991

TINO VILLANUEVA,
PETITIONER,

v.

WELLESLEY COLLEGE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT WELLESLEY COLLEGE IN OPPOSITION

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The respondent, Wellesley College, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 930 F.2d 124 (1991).

STATEMENT OF THE CASE

Petitioner was employed in the Department of Spanish at Wellesley College, first as a part-time instructor and then, starting in 1980, as a full-time assistant professor teaching, among other things, courses in Spanish language and Spanish and Chicano literature.

Petitioner was considered for tenure at Wellesley in the 1985-86 academic year. In accordance with the procedures then in effect, the Spanish Department Reappointments and Promotions Committee (the "R&P Committee"), consisting of the tenured members of the Department, met and considered whether to recommend petitioner for tenure on the basis of the five criteria specified in the College's tenure procedures: teaching, scholarship, structure of the department, service to Wellesley, and external professional activities.

In October, 1985, the R&P Committee recommended to the College's Committee on Faculty Appointments ("CFA"), by a vote of three to one, against tenure for petitioner. The majority explained that, in their view, the pace of petitioner's teaching was too slow, his student evaluations ("SEQs") were not of the superior quality the R&P Committee was seeking in a tenured professor, and he had not shown in his scholarship that he was current on the latest trends of literary criticism. The majority also stated that, while petitioner had complied with requests from his colleagues, he had not taken the initiative either to promote Department activities or to handle major Department responsibilities. Finally, with respect to Department structure, the majority noted, among other things, that the next member of the Department in line to be considered for tenure had impressive credentials.

The CFA voted to accept the R&P Committee's recommendation against tenure. The CFA consisted of five tenured faculty members elected by the faculty at large, the Dean and

the President of the College, and a black tenured faculty member selected by the black faculty at the College.

Dean Maud H. Chaplin and Associate Dean Edward A. Stettner furnished petitioner with a letter summarizing the reasons the CFA voted to deny plaintiff tenure. In reaching its decision, the CFA determined that petitioner's teaching was "much more than adequate, but it was not outstanding," and that his SEQ's were not as strong as those of many other language department tenure candidates. The CFA found that letters from outside evaluators of petitioner's published work were reserved as to its merit, while in many cases the evaluations were more enthusiastic. The CFA also noted that petitioner's service to the College community was not the strongest part of his record.

After petitioner's request for reconsideration, the CFA again voted against tenure in April 1986. Petitioner subsequently filed charges with the federal Equal Employment Opportunity Commission (the "EEOC") and the Massachusetts Commission Against Discrimination (the "MCAD") alleging that he was denied tenure at Wellesley because of his race, color, national origin, sex and age. After conducting an investigation, the EEOC on May 28, 1987, determined that there was no probable cause to believe petitioner's allegations of discrimination. The MCAD accorded substantial weight to the determination of the EEOC and on June 10, 1987 entered its own finding of lack of probable cause.

Thereafter, on August 11, 1987, petitioner filed a complaint against Wellesley in the United States District Court for the District of Massachusetts alleging that the denial of tenure to him had been based on his race, color, national origin, sex and age in violation of, among other statutes, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* ("Title VII"). Following extensive discovery, Wellesley filed motions for summary judgment dismissing all of petitioner's claims. The

case was referred to Magistrate Lawrence P. Cohen for recommended disposition.

On June 14, 1990, the Magistrate recommended allowance of Wellesley's motions. The Magistrate, for the purposes of the summary judgment motions, assumed that petitioner had established a *prima facie* case of discrimination, but also found that Wellesley had met its burden of articulating legitimate, nondiscriminatory reasons for denying tenure. Most important, the Magistrate found that petitioner had failed to produce "sufficient evidence by which a rational trier of fact — short of mere speculation or conjecture — could reasonably conclude that the legitimate, non-discriminatory reason advanced by Wellesley for denying [petitioner's] tenure bid was a pretext for illegal discrimination." On August 17, 1990, the District Court overruled petitioner's objections and entered an Order allowing Wellesley's motions for summary judgment for the reasons set forth in the Magistrate's report.

The First Circuit affirmed, concluding that "the undisputed evidence does not raise a genuine issue of material fact as to differential treatment based on impermissible discrimination." Applying the three-step burden-shifting analysis applicable to "disparate treatment" cases under Title VII (see *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-254 (1981), *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973)), the First Circuit concluded that petitioner had made out a *prima facie* case, but that Wellesley had articulated a legitimate, nondiscriminatory reason for its tenure decision: that petitioner was not sufficiently excellent in any of the five categories the College uses in assessing tenure candidacies. It was therefore petitioner's burden to raise a genuine issue of material fact that Wellesley's articulated reasons were pretextual. The heart of the First Circuit's decision was that:

> "Although Villanueva has presented evidence showing that he was qualified for tenure, he has not demonstrated

that Wellesley's justification was a pretext; *a fortiori*, he has not shown that it was a pretext for discrimination."

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the First Circuit is consistent with the decisions of this Court, and of other courts of appeal, and the petition does not present any issue warranting review by this Court. More particularly, the decision of the First Circuit does not present the questions asserted by petitioner.

1. The First Circuit did not impose a "greater burden of proof ... in an academic tenure case." Pet. i. It simply applied the established rule that summary judgment is appropriate unless plaintiff produces evidence that is admissible and "significantly probative" of the claims he has made. *E.g.*, *Anderson* v.. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-26 (1986).

The First Circuit concluded that petitioner had not presented any evidence that tended to prove that the reasons articulated by the College for the tenure denial were a pretext. With respect to petitioner's effort to compare his qualifications with others who had been granted tenure in the Spanish Department, the First Circuit found that:

> "the undisputed evidence shows that while [the] qualifications [of the two relevant candidates for comparative purposes] may have been less than or equal to Villanueva's in certain areas, both [other candidates] excelled in other areas. [One] had received a number of teaching awards, and [the other] was extraordinarily active in her service to the college community." Pet. A-13, A-14.

The First Circuit found that "nothing in Villanueva's comparative evidence raises the slightest inference that a discriminatory motive lurked beneath the surface." Pet. A-14. With respect to Villanueva's reliance upon certain statistics, the First Circuit properly found that those statistics were inadequate in the absence of, among other things, information about the composition of the relevant labor market. Pet. A-14, citing *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 650-1 (1989).

The First Circuit did not create a "special privilege" for academic institutions. On the contrary, the First Circuit specifically recognized that "Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, *within educational settings as well as without* . . . Academic freedom does not embrace the freedom to discriminate." Pet. A-8, A-9 (emphasis added). The "special considerations" adverted to by the First Circuit had nothing to do with a "special privilege" for academic institutions. Rather, the First Circuit was simply referring to two common sense propositions. First, the nature and type of evidence that establishes a *prima facie* case of discrimination, or that establishes pretext, will vary "[d]epending on the facts and circumstances of each case." (Pet. A-6, A-7). Recognizing these differences does not change the burden of proof which a plaintiff must meet. It is true in all Title VII cases, as the First Circuit held in this case, that the plaintiff must convince a jury that the employer's articulated reasons were not merely mistaken but that they were pretextual.

The second proposition follows from the first: In Title VII cases, whether involving tenure or otherwise, the court or jury is not entitled to substitute its judgment as to the wisdom of the employer's decision, but only to determine whether the employer's decision resulted from unlawful discrimination. See generally *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion) ("The other important aspect of

[Title VII] is its preservation of an employer's remaining freedom of choice"). The First Circuit therefore recognized that it was not its function to sit as a "supertenure" committee, judging the "wisdom" of the tenure denial, and that it would intrude on academic freedom, and exceed the Court's authority under Title VII, if it attempted to exercise any such role. These observations were manifestly correct and consistent with the purposes of Title VII. See also *Zahorik* v. *Cornell University*, 729 F.2d 85, 94 (2nd Cir. 1984) ("Absent evidence sufficient to support a finding that such disagreements or doubts [about tenure qualifications] are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievements and to act upon the good faith judgments of their departmental faculties or reviewing authorities.")

2. The First Circuit in this case did not require petitioner "to adduce some evidence of prohibited discrimination in addition to rebutting the employer's nondiscriminatory explanation." Pet. i. Petitioner's case failed because he *did not rebut* the College's nondiscriminatory explanation: "In our judgment, Villanueva failed to rebut Wellesley's justification." Pet. A-13. The petitioner *did not show* that the College's articulated reasons were pretextual: "[Villanueva] has not demonstrated that Wellesley's justification was a pretext; *a fortiori*, he has not shown that it was a pretext for discrimination." *Id.* Accordingly, this case does not present the question whether a Title VII plaintiff can be required to do more than rebut the employer's proffered justification in order to defeat a motion for summary judgment.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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